

1-1-1991

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## Recommended Citation

Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345 (1991).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol31/iss2/2>

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## REGULATION OF HATE SPEECH BY EDUCATIONAL INSTITUTIONS: A PROPOSED POLICY

Jack M. Battaglia\*

Paralleling an increase in hate motivated violence and assaults in society at large,<sup>1</sup> incidents on college campuses have become alarmingly frequent. Motivated by class based animus, students have abused other students and faculty members with words and symbols clearly intended to harass and intimidate.<sup>2</sup> As a result, a number of educational institutions, public and private, either have adopted or are considering policies which would prohibit words or symbols which injure members of racial or religious minorities or other groups warranting special protection.<sup>3</sup>

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1. See generally Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2327-31 (1989). Anecdotal information is often perceived by those who do not identify with target groups as describing random and isolated incidents. However, "[f]or informed members of these victim communities, . . . it is logical to link together several thousand real life stories into one tale of caution." *Id.* at 2331. The difficulties of quantifying the extent of hate violence will, hopefully, be ameliorated with the recent passage of the Federal Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990). The new law requires the Department of Justice to collect data on crimes motivated by race, religion, national origin, or sexual orientation.

2. Matsuda, *supra* note 1, at 2333 n.71; *Recent Cases - Racist and Sexist Expression on Campus - Court Strikes Down University Limits on Hate Speech*, 103 HARV. L. REV. 1397, 1399-1400 (1990); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.I.L. L. REV. 133, 135 n.12 (1982); Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 176-78 (1990) ("These slurs rape the soul."). Recent racist activity on campus has been characterized as a "backlash" against affirmative action and attempts to diversify the curricula with ethnic-based courses. *White Students' Backlash Mounting at Universities*, San Francisco Examiner, May 28, 1990, at A8, col. 3.

3. *Recent Cases*, *supra* note 2, at 1397 n.1. By statute, two states provide a civil remedy for intimidation or harassment motivated by specified class-based

To the extent that a hate speech<sup>4</sup> policy is considered a content based restriction on expression,<sup>5</sup> it will raise serious first amendment questions. With varying approaches, several commentators have argued that various forms of hate speech may be prohibited consistent with the first amendment.<sup>6</sup>

This article searches pertinent first amendment authority for principles which would support a hate speech policy at educational institutions, and proposes the text of a policy which is believed to reflect those principles. Although there is much appeal to Professor Matsuda's position that "[w]e can attack racist speech - not because it isn't really speech, not because it falls within a hoped-for exception, but because it is wrong,"<sup>7</sup> a more limited approach exists which will effectively accommodate all the values having an impact on the issue.

Part I of this article reviews the most relevant first amendment doctrine, as revealed in cases involving (A) "fighting words" and the incitement to the lawless action, (B) group defamation, and (C) the imposition of tort liability for individual injury. Section (D) addresses cases involving hate speech,

animus. R.I. GEN. LAWS § 9-135 (1985); VA. CODE ANN. § 8.01-42.1 (West 1984 & Supp. 1988).

4. For purposes of discussion only, the term "hate speech" is used to describe verbal or behavioral expression which reflects class based animus by reason of race, ethnicity, national origin, gender, religion, handicap, sexual orientation, or other class characteristics which have no relationship to individual value.

5. "Because racial insults differ from ordinary, non-actionable insults precisely because they use racial terms for the purpose of demeaning the victim, a tort for racial insults will almost certainly be seen as a regulation of content and thus be subject to the more exacting scrutiny afforded in such cases." Delgado, *supra* note 2, at 172-73. See *infra* notes 109-11 and accompanying text.

6. See *supra* notes 1-2. See also Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 HOW. L.J. 429 (1980); Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281; Au, *Freedom From Fear*, 15 LINCOLN L. REV. 45 (1984); Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979); Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990). Compare with Heins, *Banning Words: A Comment on "Words That Wound"*, 18 HARV. C.R.-C.L. L. REV. 585 (1983). For an account of the Canadian experience under a law making it a criminal offense willfully to promote hatred against people distinguished by race, religion or ethnic origin, see A. Borovoy, K. Mahoney, B. Brown, J. Cameron & D. Goldberger, *Colloquium, Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L. REV. 337 (1989).

7. Matsuda, *supra* note 1, at 2380. Professor Matsuda argues for an "explicit content-based rejection of narrowly defined racist speech." Matsuda, *supra* note 1, at 2360.

and those cases which apply general first amendment doctrine in the particular setting of educational institutions are discussed in section (E).

Part II identifies the elements of a hate speech policy which will be able to withstand first amendment scrutiny, including (A) the harmful or undesirable effects which the policy might seek to prevent, (B) the causal relationship between the proscribed speech and those effects, and (C) necessary first amendment safeguards. Four hate speech policies which have been adopted or proposed are analyzed in the context of these elements.

Part III proposes a hate speech policy which more precisely reflects competing interests. This author proposes that hate speech, which has the purpose and likely effect of intimidating students from full participation in educational processes, can be proscribed consistent with the first amendment, and, indeed, should be proscribed in educational settings.

### I. FIRST AMENDMENT PRINCIPLES

Public educational institutions are constrained by the first amendment in enforcing policies which affect speech. The formulation of first amendment standards applicable in the educational context may differ from those which govern more public speech, and may vary by level of institution.<sup>8</sup> Nevertheless, the first amendment antipathy to content based inhibitions on speech remains the primary operative value.

Private educational institutions have a choice. On the one hand, they may attempt to devise policies which would withstand judicial scrutiny if adopted by a similar public institution, in other words, policies which give primacy to the first amendment. On the other hand, they may be guided by the values of the particular institution, in the relative positions of importance ascribed to them by the institution. As applied to the relationship between the institution and its members, this process may or may not strongly resemble the first amendment's mediation between the government and its citizenry.

The first amendment constructs no absolute bar to governmental regulation of speech. Expression in all forms, wheth-

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8. See *infra* notes 84-107 and accompanying text.

er perceived aurally or visually, is subject to reasonable and non-discriminatory time, place, and manner restrictions.<sup>9</sup> In such situations, and others in which the regulation is not aimed at the communicative impact of the speech, the governmental interest furthered by the regulation is balanced against the first amendment interest. However, when regulation is aimed at communicative impact, it will be sustained only if it falls within certain categories of unprotected speech, or is otherwise justified by a compelling state interest.<sup>10</sup>

A. "Fighting Words"/Incitement

In *Chaplinsky v. New Hampshire*,<sup>11</sup> the Supreme Court held that a state could criminalize "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>12</sup> Although the Court's delineation of the type of speech subject to proscription has two parts and is stated in the disjunctive—words "which by their very utterance inflict injury" or words which "tend to incite an immediate breach of the peace"—subsequent decisions have focused on the actual likelihood of such a breach of the peace, and have virtually ignored that portion of the formulation which looks to whether the speech, without more, directly causes injury.<sup>13</sup> However, the Court has never expressly repudiated the direct injury portion of the "fighting words" formulation.<sup>14</sup>

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9. *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

10. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 580-82, 602 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975); Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 441, 460-61 (1988).

11. 315 U.S. 568 (1942).

12. *Id.* at 572.

13. See e.g., *Cohen v. California*, 403 U.S. 15, 20 (1971) ("fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"); *Texas v. Johnson*, 109 S. Ct. 2533, 2542 (1989) ("fighting words" are those "likely to provoke the average person to retaliation, and thereby cause a breach of the peace").

14. Justice Powell considered the direct injury portion to have significant force. *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (per curiam) (Powell, J., dissenting). After reviewing the post-*Chaplinsky* cases, one commentator concluded that the direct injury portion of the formulation still has limited application when

The breach-of-the-peace portion of the *Chaplinsky* formulation is consistent with more generally applicable first amendment principles. In effect, it incorporated the previously articulated "clear and present danger" test.<sup>15</sup> That test, which was developed in cases involving advocacy of the use of force or of a violation of law, in its modern formulation looks to whether the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>16</sup> The incitement formulation articulates a state-of-mind requirement, as well as an assessment of the probability that the speech will produce lawless action.<sup>17</sup> The *Chaplinsky* "fighting words" formulation does not by its terms refer to the speaker's state of mind. Rather, once the requisite effect is established, the speaker's state of mind may be presumed.<sup>18</sup>

#### B. Group Defamation

The "fighting words"/incitement doctrines provide a clear but limited basis for prohibiting hate speech. A broader basis might be found in *Beauharnais v. People of the State of Illinois*, which upheld a criminal statute prohibiting any publication or exhibition which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion to contempt, derision or obloquy or which is productive of breach of the peace or riots . . . ." <sup>19</sup> Previously, in

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the utterance constitutes a "direct personal insult." Rabinowitz, *Nazis in Skokie: "fighting words" or Heckler's Veto*, 28 DE PAUL L. REV. 259, 274 (1979). Another, however, concludes that the subsequent opinions "cast serious doubt on whether words may be punished as offensive unless they create a substantial risk of responsive violence." R.K. GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* at 210 (1989).

15. See *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Schenck v. United States*, 249 U.S. 47 (1919).

16. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

17. State of mind was also related to the existence of a clear and present danger. *Schenck*, 249 U.S. at 52 ("If the act, [speaking, or circulating a paper,] its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making it a crime.").

18. Professor Greenawalt suggests that the "fighting words" doctrine did not under traditional law require intent, but only a likelihood of promoting a violent response; and argues that "it should be sufficient for punishment that the defendant know the propensity of the words he uses, even if at the time of speaking he was in such a rage he did not consider their likely effect." R.K. GREENAWALT, *supra* note 14, at 282-83.

19. 343 U.S. 250, 251 (1952).

*Chaplinsky*, the Court had listed "the libelous" among those "classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem."<sup>20</sup> The Court in *Beauharnais* then reasoned that "if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State."<sup>21</sup> After recognizing a history of racial and religious disorder in Illinois, and the "claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community,"<sup>22</sup> the Court found that the statute withstood scrutiny under the stated standard.

There is a serious question as to whether *Beauharnais* in its broadest thrust remains good law.<sup>23</sup> The articulated standard ("purposeless restriction unrelated to the peace and well-being of the state") is certainly more deferential to the legislative judgment than contemporary first amendment stan-

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20. 315 U.S. 568, 571-72 (1942). The "lewd and obscene" were also listed. For arguments analogizing racist speech to obscenity, see Delgado, *supra* note 2, at 177-78, and Lasson, *Racial Defamation As Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 47 (1985). It has been suggested that "fighting words", incitement and obscenity are speech that "bypasses the conscious faculties of its hearers," and, therefore, "causes harm in such a way that it cannot be counteracted by opposing speech." Note, *supra* note 6, at 318. So too might hate speech. However, this rationale for proscribing hate speech must be limited by the recognition that the first amendment protects the emotive as well as the cognitive force of speech. *Cohen v. California*, 403 U.S. 15, 26 (1971).

21. 343 U.S. at 258. Professor Smolla characterizes *Beauharnais* as an example of "generic clear and present danger," that is, "it is within the legitimate proenance of the state legislature to make generic determinations concerning individual harm and communal danger." Smolla, *supra* note 2, at 193-95.

22. *Beauharnais*, 343 U.S. at 263. Professor Kretzmer, Hebrew University of Jerusalem, argues that racist speech is unique among the types of speech which may be offensive or dangerous because of the "catastrophic historical experience with racism," and the "universal formal condemnation of racism." Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 458 (1987). For a discussion of the role of social science in establishing the likelihood of harm for first amendment purposes, see Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1191-96, 1292-96 (1978).

23. But see *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun & White, J.J., dissenting from denial of certiorari). The commentators also disagree. See, e.g., Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 694-96 (1988) (still good law); Lasson, *supra* note 20, at 32-37 (still good law); Cf. Smolla, *supra* note 10, at 413-44 ("*Beauharnais* . . . must be regarded as a dead case.").

dards. Similarly, to the extent that *Beauharnais* rests upon a relationship between racial and religious propaganda and the history of disorder in Illinois, it may have required less of a degree of causal probability than is demanded by more recent case law.<sup>24</sup> Furthermore, whereas *Beauharnais* sustained the refusal of the Illinois courts to entertain truth as a defense,<sup>25</sup> the Supreme Court's more recent first amendment decisions mandate that the individual libel plaintiff prove falsity "against a media defendant for speech of public concern."<sup>26</sup>

### C. Individual Injury

Perhaps most importantly, the major premise of *Beauharnais*—that there is no first amendment bar to state proscription of libelous statements as to an individual—has been substantially undermined. Beginning in 1964, the Supreme Court has ruled that first amendment considerations require that public officials and those "properly classified as public figures . . . may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."<sup>27</sup>

In the case of "defamatory falsehood injurious to a private individual," the balance between first amendment values and the state's legitimate interest in providing compensation for injury to reputation strikes at a different point than in the case of public persons, and "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability."<sup>28</sup> Once fault is established, the individual private plaintiff may recover for actual injury, which can include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."<sup>29</sup> If the individual private plaintiff can meet the

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24. See *Collin v. Smith*, 578 F.2d 1197, 1204 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

25. 343 U.S. at 265-66. The question of truth in a group libel case is, at best, "complicated". Reisman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 777 (1942).

26. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

27. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

28. *Id.* at 346-47.

29. *Id.* at 350. Indeed, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Supreme Court upheld recovery by a private plaintiff when the only injury for



knowing-or-reckless-falsity standard of liability applied to public persons, there may be recovery of presumed damages, without proof of actual injury. Punitive damages may be recovered as well.<sup>30</sup> Moreover, when the defamatory speech addresses a matter of purely private concern, the private plaintiff may recover presumed damages and punitive damages even without a showing of knowing or reckless falsity.<sup>31</sup>

The Supreme Court has held that false statements of fact, on which the defamation cause of action is based, have "no constitutional value."<sup>32</sup> Like "fighting words," they "are no essential part of any exposition of ideas" and have "slight social value as a step to truth."<sup>33</sup> However, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."<sup>34</sup> When a false and defamatory statement is made about an individual, the fault standards imposed in part by reference to the public or private status of the individual provide the necessary accommodation between first amendment freedom and the states' interest in compensating for injury.

Where does this leave *Beauharnais*? At common law, a defamatory statement made about a group or class could properly be the basis of an action by an individual member of the group or class, only if the group were sufficiently small, or if there were other circumstances so as to allow the conclusion that the particular plaintiff was defamed.<sup>35</sup> Therefore, the

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which the plaintiff sought compensation was the emotional distress induced by the defamation.

30. *Gertz*, 418 U.S. at 349-50.

31. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1984). Whether or not speech addresses a matter of public concern will be determined by its "content, form, and context." *Id.* at 761 (citing *Connick v. Meyers*, 461 U.S. 138, 145 (1983)).

32. *Gertz*, 418 U.S. at 340.

33. *Id.* (quoting *Chaplinsky*, 315 U.S. 568, 572 (1942)).

34. *Id.* at 341. The notion that "[t]he danger of government suppressing true ideas is greater than the harm that will be caused by allowing free expression of defined, almost certainly false, ideas" is no more nor less than "a postulate, or an article of faith." Kretzmer, *supra* note 22, at 474. Moreover, "[t]here are some views, the chance of whose being true is so small, even granted human fallibility, that the risk of suppressing truth cannot be serious reason for disallowing their suppression." Kretzmer, *supra* note 22, at 471.

35. See, e.g., *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); Note, *Group Defamation: Five Guiding Factors*, 64 TEX. L. REV. 591 (1985); Belton, *The Control of Group Defamation: A Comparative Study of Law and Its Limitations*, 34 TUL.

state interest validated in *Gertz* was based upon at least a presumption of individual harm. *Beauharnais* was based in part on deference to a legislative judgment "that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."<sup>36</sup>

Aside from defamation and the related area of false light privacy,<sup>37</sup> the Supreme Court has only infrequently considered the limitations which the first amendment imposes on tort recovery for individual injury. In a case bordering on the defamation/false light area, *Hustler Magazine, Inc. v. Falwell*,<sup>38</sup> the Court held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one [t]here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true."<sup>39</sup> In the case of

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L. REV. 469, 474-80 (1960). The cases recognize an exception when the defamatory statement, "though made in group terms, is really a veiled reference to a specific group member." Comment, *Group Defamation and Individual Actions: A New Look at an Old Rule*, 71 CALIF. L. REV. 1532, 1535-36 (1983). For an argument that "the psychological model behind the common-law limits on group libel actions is inapposite when vilifying speech is directed at a target group against which the hearer is already prejudiced," see Note, *supra* note 6, at 309-14. In addition to the question of harm, recognition of the rights of the group involves difficult issues of principle. Kretzmer, *supra* note 22, at 467.

36. 343 U.S. at 263. It has been suggested that, assuming group libel remains constitutionally viable, *Gertz* would require a showing of knowing or reckless falsity: first, because "group libel of at least some types may be deemed more like public-figure than like private-individual libel"; and, second, because such a showing "is a necessary predicate to all punitive recovery or to any recovery in the absence of a showing of 'actual damages.'" N. DORSEN, P. BENDER & B. NEWBAINE, *EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 658 (1976). See also Reisman, *supra* note 25, at 777 ("[A]most nothing that groups do is 'private, in the sense of being wholly outside the conceivable bounds of communal concerns.") At least seven states have statutes which cover group libel: CONN. GEN. STAT. § 53-37 (1991); ILL. ANN. STAT. Ch. 38 § 27-1 (1961); MASS. GEN. L. Ch. 272, § 98(c) (1990); MINN. STAT. § 609.765 (1987); MONT. CODE ANN. § 45-8-212 (1989); NEV. REV. STAT. § 200-510 (1986); W. VA. CODE § 61-10-16 (1989). Of these, only the Massachusetts, Illinois and Montana provisions require a showing of intent.

37. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

38. 485 U.S. 46 (1988).

39. *Id.* at 56.

the purported parody to which Falwell objected, he was required to show that the magazine made a "reasonably believable" statement of fact.<sup>40</sup>

The practical effect of the Court's ruling clearly is to prevent the public plaintiff from circumventing the first amendment defamation rules by suing instead for intentional infliction of emotional distress. However, it did so by injecting into the legal elements of emotional distress a falsity requirement which was not present before and which, at least as a general proposition, does not fit the theory of the tort.<sup>41</sup> As the Court saw it, when applied to suits by public officials and public figures,<sup>42</sup> the common law elements of the tort, including intent and outrageousness, are in themselves insufficient to accommodate first amendment interests.<sup>43</sup>

The *Falwell* case illustrates the difficult distinctions between fact and opinion, or fact and idea, for first amendment purposes. In the more recent case of *Milkovich v. Lorain Journal Co.*,<sup>44</sup> the Court reversed a state court's recognition of a constitutionally required opinion exception to the application of its defamation laws. The Court found that first amendment interests are "adequately served by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."<sup>45</sup> Existing doctrine "ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection,"<sup>46</sup> and provides "protection for statements that cannot 'reasonably [be] interpreted as

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40. *Id.* at 57.

41. The *Falwell* approach to accommodating first amendment interests and those furthered by the emotional distress tort has been criticized. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 81-82 (1990). But it has also been defended. See Smolla, *supra* note 10, at 448-52.

42. This qualification is highlighted by the Court's quotation from *Dun & Bradstreet* that "not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1984).

43. *Falwell*, 485 U.S. at 55-56 ("Outrageousness, in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.* at 55.)

44. 110 S. Ct. 2695 (1990).

45. *Id.* at 2706.

46. *Id.*

stating actual facts' about an individual."<sup>47</sup> The relevant inquiry, therefore, is "whether or not a reasonable factfinder could conclude that the statements . . . imply an assertion" of fact about an individual,<sup>48</sup> which, in turn, would seem to depend upon whether the statements are "sufficiently factual to be susceptible of being proved true or false."<sup>49</sup>

The Court has also considered a few cases in which civil recovery was sought for an invasion of privacy based upon the publication of concededly factual and true statements. The Court has held that, under the facts presented, because the information was lawfully obtained, liability could not be constitutionally imposed for its publication.<sup>50</sup> Clearly engaging in *ad hoc* balancing, the Court refused to hold that "truthful publication may never be punished consistent with the First Amendment,"<sup>51</sup> and suggested "the possibility that, in a proper case, imposing civil sanctions for publication" of true information might be "overwhelmingly necessary" to satisfy the state's interests.<sup>52</sup>

However, the Court raised the first amendment barrier to liability in *Florida Star* because, among other reasons, the state's rules "require[d] no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive,"<sup>53</sup> "[n]or is there a scienter requirement of any kind . . . engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods."<sup>54</sup>

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47. *Id.* (quoting *Fahwell*, 485 U.S. at 50).

48. *Id.* at 2707.

49. *Id.*

50. *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989).

51. *Id.* at 2608-09.

52. *Id.* at 2611.

53. *Id.* at 2612. Previously the Court had ruled in the criminal context that an individualized determination was required in order to sustain a prohibition on the disclosure of information regarding judicial misconduct proceedings. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-44 (1978). However, the type of information involved in that case "lies near the core of the First Amendment." *Id.* at 838.

54. *Florida Star*, 109 S. Ct. at 2612. The Court had determined the news article which was the subject of the action (if not the particular fact disclosed) concerned a "matter of public significance." *Id.* at 2611. Therefore, the *Gertz* fault standard provided an appropriate comparison.

A number of cases have arisen in which state and lower Federal courts have been asked to impose civil liability on the media for personal injury alleged to have resulted from printed or broadcast speech. In some cases, the injured party imitated conduct which was described or portrayed on television or in a magazine,<sup>55</sup> thus resulting in harm to the victim from his own conduct in reaction to the speech.<sup>56</sup> In others, third parties imitated the harm-producing conduct,<sup>57</sup> the media allegedly creating or contributing to the risk of harm to the victim.<sup>58</sup>

Contrary to the thrust of *Gertz*, the courts usually analyze these cases under the incitement test of *Brandenburg v. Ohio*, *supra*, and rule that the plaintiff has failed to establish that the speech is unprotected by the first amendment.<sup>59</sup> Even when it is recognized that *Brandenburg* is of limited applicability in the context of a private civil suit for tort damages, the standard of care imposed precludes liability in all but the most unusual cases.<sup>60</sup>

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55. *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580, on remand 158 Ga. App. 508, 281 S.E.2d 648 (1981) (child attempted to reproduce sound effect demonstrated on children's TV program by rotating BB inside an inflated balloon); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (1982) (boy apparently hanged himself while imitating hanging stunt observed on TV); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (adolescent's death allegedly caused by magazine article which described practice of autoerotic asphyxia).

56. *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988) (boy shot and killed himself while lying on his bed listening to recorded music, as result of alleged "uncontrollable impulse" created by music).

57. *Olivia N. v. National Broadcasting Co.*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977) (girl artificially raped with a bottle by minors who had allegedly seen an artificial rape scene on TV drama).

58. *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979) (boy became so desensitized by TV violence that he developed a sociopathic personality and killed neighbor); *Weirum v. RKO Gen'l, Inc.*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975) (victim's auto forced off the road by young motorist listening to and engaged in radio station contest to locate disc jockey driving about and giving away money); *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863 (S.D. Tex. 1988), *rev'd*, 880 F.2d 830 (5th Cir. 1989) (magazine ran personal services advertisement through which husband of deceased contracted to have deceased murdered).

59. See generally *Olivia N.*, 74 Cal. App. 3d at 388-89, 141 Cal. Rptr. at 514; *Herceg*, 814 F.2d at 1023. That liability was imposed in *Weirum*, 15 Cal. 3d at 40, 523 P.2d at 36, 123 Cal. Rptr. at 468, has been explained on the ground that the case involved "a specie of incitement to imminent lawless conduct for which no First Amendment protection is justified." *McCollum*, 202 Cal. App. 3d at 1005, 249 Cal. Rptr. at 196.

60. *Shannon*, 247 Ga. at 420, 276 S.E.2d at 583. In *Eimann*, 680 F. Supp. at

In none of the personal injury cases which have applied the incitement test has the court adequately explained why the approach in *Gertz* is less appropriate. Indeed, they rarely recognize that an issue arises.<sup>61</sup> Although the results in these cases can be distinguished from the usual hate speech context in that "[t]here was no dynamic interaction with or live importuning of, particular listeners,"<sup>62</sup> that fact appears to be addressed to the question of whether or not the incitement test had been satisfied, rather than the appropriateness of applying this test.

#### D. Hate Speech Cases

In *Collin v. Smith*,<sup>63</sup> the Seventh Circuit found unconstitutional an ordinance which prohibited "[t]he dissemination of any materials . . . which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so." The village which adopted the ordinance did not rely on any fear of responsive violence to justify the ordinance. As a result, the ordinance could not be sustained under the "fighting words"/incitement doctrines. Nor could it be sustained under *Beauharnais*, given the court's limited reading of its rationale.<sup>64</sup>

The village in *Collin*, which had a large Jewish population, proposed to apply the ordinance to Nazi marches which involved Nazi uniforms and swastikas. The village sought to sus-

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683, the District Court permitted recovery on the basis of negligence. On appeal, the Fifth Circuit reversed on the negligence issue, noting the "limited first amendment protection for commercial speech" during its risk-utility analysis. See also Meyerson, *This Gun for Hire: Dancing in the Dark of the First Amendment*, 47 WASH. & LEE L. REV. 267 (1990).

61. A notable exception is Judge Jones' concurring and dissenting opinion in *Herzeg*, 814 F.2d at 1025-1030, in which she rejects the *Brandenburg* approach in favor of balancing. Both the "incitement model" and the "balancing model" have been found wanting when applied in the tort context. Anderson, *supra* note 41, at 73-75, 90-97. See also Note, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529 (1979); Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744 (1984).

62. *McCollum*, 202 Cal. App. 3d at 1005, 249 Cal. Rptr. at 197.

63. 578 F.2d 1197, 1204 (7th Cir. 1978) *cert. denied*, 439 U.S. 916 (1978).

64. *Id.* at 1202-05. For an argument that *Collin* was correctly decided, see Downs, *Shokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 661-66 (1985).

tain the ordinance on the basis of its interest in preventing "the infliction of psychic trauma on resident holocaust survivors and other Jewish residents."<sup>65</sup> The court noted that Illinois recognized the tort of intentional infliction of emotional distress; but even "[a]ssuming that specific individuals could proceed in tort under this theory to recover damages probably occasioned by the proposed march, and that a First Amendment defense would not bar the action, it is nonetheless quite a different matter to criminalize protected First Amendment conduct in anticipation of such results."<sup>66</sup>

The court noted, however, that "[t]here is room under the First Amendment for the government to protect targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or a captive audience cannot practically avoid exposure."<sup>67</sup> The court also noted that it was not considering a law prohibiting the "menacing by uniformed bullies of a survivor of the holocaust, or anyone else, on the street."<sup>68</sup> Nor was it reviewing a law which prohibited "action designed to impede the equal exercise of guaranteed rights, . . . or even a conspiracy to harass or intimidate others and subject them thus to racial or religious hatred."<sup>69</sup>

In contrast to *Collin v. Smith* is *Vietnamese Fishermen's Association v. Knights of the K.K.K.*,<sup>70</sup> in which the private Vietnamese Fishermen's Association and the State of Texas sought, and obtained, injunctive relief against, among other things, military training programs conducted by the K.K.K. In an earlier opinion, the court had concluded that "provocative statements by defendants constituted intimidation and had a substantial possibility of inciting others to engage in acts of violence and intimidation directed at the Vietnamese fisher-

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65. *Collin*, 578 F.2d at 1205.

66. *Id.* at 1205-06. See Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985), arguing that extreme and outrageous language can be the object of tort liability only when its use constitutes "'fighting words'" or invades an area of recognized spacial privacy of the plaintiff.

67. *Collin*, 578 F.2d at 1206.

68. *Id.* at 120 n.8.

69. *Id.* at 1204 n.13. Recently, a city's denial of a parade permit to the K.K.K. was declared violative of the first amendment by a Federal District Judge. *Town Rulers Can't Rein in Klan Parade*, San Francisco Daily Journal, July 5, 1990, at 7, col. 1.

70. 543 F. Supp. 198 (S.D. Tex. 1982).

men," so as to warrant the characterization "fighting words."<sup>71</sup> In this opinion, the court found that "the threat of violence which defendants communicated through their military activities is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words' . . . "<sup>72</sup> The court issued a broad injunction which prohibited "intimidation of the plaintiff class," "the burning of crosses on property within the geographic area where members of the plaintiffs' class live," "gatherings of two or more robed members of the Knights of the Ku Klux Klan within the personal view of members of the class," and "any other activities which have as their purpose or reasonably foreseeable effect the use or threatened use of military or paramilitary force to infringe upon the civil rights of the plaintiff class."<sup>73</sup>

In *Doe v. University of Michigan*,<sup>74</sup> the court considered the constitutionality of a university policy on hate speech. Generally, the policy prohibited individuals, under penalty of sanctions, from "stigmatizing or victimizing" individuals or groups on the basis of, among other characteristics, race, religion, ethnicity, gender or sexual orientation.<sup>75</sup> The plaintiff was a psychology graduate student, concerned that discussion of certain controversial theories positing biologically-based differences between sexes and races might be sanctionable under the policy.<sup>76</sup> The court found that the drafters of the policy intended that speech need only be offensive to be sanctionable,<sup>77</sup> and that students in the classroom and research setting who "offended others by discussing ideas deemed controversial could be and were subject to discipline."<sup>78</sup> Moreover, the "innocent intent of the speaker was

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71. *Id.* at 208.

72. *Id.*

73. *Id.* at 219-20.

74. 721 F. Supp. 852 (E.D. Mich. 1989).

75. *Id.* at 853, 856.

76. *Id.* at 858.

77. *Id.* at 860.

78. *Id.* at 861. "We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets . . . 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *U.S. v. Eichman*, 110 S. Ct. 2404, 2410 (1990) (quoting from *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989)).



apparently immaterial to whether a complaint would be pursued."<sup>79</sup>

As interpreted and applied by the university, the policy was found to be invalid for both overbreadth and vagueness, on the latter ground because the university "never articulated any principled way to distinguish sanctionable from protected speech."<sup>80</sup> However, the court made clear the limited scope of its ruling. First, consistent with "the privacy of the home, where the individual's right to be left alone clearly outweighs the First Amendment rights of an intruder,"<sup>81</sup> the court noted that the constitutionality of the policy as it related to verbal conduct and verbal behavior in university housing was not raised in the complaint.<sup>82</sup> More generally, the court noted that the policy was not limited to threats for purposes of intimidation, the use of harassment to create a "hostile or offensive working environment," or libel and slander "including possibly group libel," for "[i]f the Policy had the effect of only regulating in these areas, it is unlikely that any constitutional problem would have arisen."<sup>83</sup>

### 1. *Educational Institutions*

Although the court in *Doe* recognized that general first amendment principles "acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission,"<sup>84</sup> there is no separate treatment of the Supreme

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79. *Doe v. University of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

80. *Id.* at 867.

81. *F.C.C. v. Pacifica Found'n*, 438 U.S. 726, 748 (1978).

82. *Doe*, 721 F. Supp. at 856 n.6.

83. *Id.* at 862-63. Professor Greenawalt identifies 21 different ways in which state law, as reflected in the Model Penal Code, criminalizes speech. Greenawalt, *supra* note 14, at 6-7. Federal protection against workplace discrimination extends to the creation of a "hostile environment" based upon racial or sexual harassment, even when speech creates the environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-67 (1986). In *Meritor*, the "Court may have implicitly carved out an area of first amendment law . . . in which equality interests can outweigh free expression interests." Recent Cases, *supra* note 2, at 1401 n.43. See generally Denis, *Race Harassment Discrimination, A Problem That Won't Go Away?*, 10 EMPLOYEE REL. L. J. 415, 422-24 (1984). See *infra* note 173.

84. *Doe*, 721 F. Supp. at 863. On the other hand, university campuses have been characterized as "governmentally created forums," and "[t]here is first amendment authority for the proposition that where government creates a forum for

Court's decisions in the educational context. In *Tinker v. Des Moines Independent Community School District*,<sup>85</sup> which involved symbolic speech in a public high school, the Court authorized restriction of student speech when "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."<sup>86</sup> The first part of the formulation is akin to the breach of the peace standard in the criminal context. The second recognizes the institution's interest in protecting its students from injurious speech, an interest also recognized in both civil and criminal law.

In *Hazelwood School District v. Kuhlmeir*,<sup>87</sup> the Court held that the *Tinker* formulation would not be applied to "educators' authority over . . . expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school."<sup>88</sup> Such activities include school sponsored publications and any other "part of the school curriculum, whether or not they occur in a traditional classroom setting."<sup>89</sup> Control over speech in such contexts is permitted whenever "reasonably related to legitimate pedagogical concerns."<sup>90</sup>

The *Hazelwood* Court relied heavily on an earlier ruling in *Bethel School District No. 403 v. Fraser*,<sup>91</sup> which permitted a student to be disciplined for having delivered a speech that was "vulgar," "lewd" and "plainly offensive" at an "official school assembly."<sup>92</sup> Quoting from *Fraser*, the Court held that a school must be free to "disassociate itself" from speech which is "wholly inconsistent with the 'fundamental values' of public school education,"<sup>93</sup> or which advocates conduct "inconsistent

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private speech the government enjoys a broader power to regulate the content of the speech than it would otherwise possess." Smolla, *supra* note 2, at 202-03 (citing *F.C.C.*, 438 U.S. at 748).

85. 393 U.S. 503 (1969).

86. *Id.* at 511.

87. 484 U.S. 260 (1988). *Hazelwood* is criticized in Dienes and Connally, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 370-77 (1989).

88. *Id.* at 271.

89. *Hazelwood*, 484 U.S. at 271.

90. *Id.* at 273.

91. 478 U.S. 675 (1986).

92. *Hazelwood*, 484 U.S. at 271 n.4.

93. *Id.* at 266-67.

with 'the shared values of a civilized social order.'"<sup>94</sup> Specifically, a school may "disassociate itself" from speech that is "biased or prejudiced."<sup>95</sup>

Having held that the *Tinker* formulation did not apply to the school sponsored speech involved in the case before it, the *Hazelwood* Court found it unnecessary to decide whether the lower appellate court was correct in limiting the rights-of-others portion of the formulation to situations where the subject speech could result in tort liability to the school.<sup>96</sup> The Court also noted that it was not deciding "whether the same degree of deference [to educators' decisions] is appropriate with respect to school-sponsored expressive activities at the college and university level."<sup>97</sup> In the first amendment establishment clause context, the Court has discerned a difference in the susceptibility of students at different educational levels to an implication of government endorsement.<sup>98</sup>

Several lower federal courts have considered whether secondary school officials may prohibit speech which African American students have found offensive. At least against a backdrop of past racial disorder and continuing racial tensions, courts have found that *Tinker* allows the prohibition in the interest of preventing future disruption.<sup>99</sup> However, where the interest to be furthered by the prohibition on racially offensive speech is not the prevention of disruption, but a reduction in discrimination allegedly practiced against African Amer-

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94. *Id.* at 272.

95. *Id.* at 271. Public schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system." *Amibach v. Norwick*, 441 U.S. 68, 77 (1979).

96. *Hazelwood*, 484 U.S. at 273 n.5.

97. *Id.* at 273-74 n.7. However, citing *Tinker*, the Court has stated: "A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981). Compare *Martin v. Parrish*, 805 F.2d 583, 585-86 (5th Cir. 1986) with *Di Bona v. Matthews*, 220 Cal. App. 3d 1329, 269 Cal. Rptr. 882 (1990).

98. Compare *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985) with *Widmar*, 454 U.S. 263, 274 n.14 (1981).

99. *Melton v. Young*, 465 F.2d 1332, 1335 (6th Cir. 1972); *Tate v. Board of Educ. of Jonesboro, Ark.*, 453 F.2d 975, 982 (8th Cir. 1972) (dictum); *Augustus v. School Bd. of Escambia County, Fla.*, 507 F.2d 152, 156, 158 (5th Cir. 1975) (dictum). See also *Guzick v. Drebus*, 431 F.2d 594, 597 (6th Cir. 1970) (prohibition against all buttons upheld, when buttons with racial messages had caused disruption).

ican students, a demonstration of a greater causal nexus may be required.<sup>100</sup>

In *Trachtman v. Anker*,<sup>101</sup> the Second Circuit held that secondary school officials could prohibit distribution of a sex questionnaire, which the officials believed would cause emotional harm to some students. Although the court spoke variously of "reasonable cause to believe,"<sup>102</sup> "substantial basis" and "rational basis,"<sup>103</sup> the thrust of the opinion was the court's deference to the judgment of the officials "to protect the students committed to their care . . . from peer contacts and pressures which may result in emotional disturbance to some of those students."<sup>104</sup>

Indeed, particularly at the college and university level, the institution's self-governance is itself of first amendment significance.<sup>105</sup> Specifically, a first amendment interest arises in "select[ing] those students who will contribute the most to the 'robust exchange of ideas.'"<sup>106</sup> A diverse student body serves that interest, which is considered to be compelling.<sup>107</sup>

## II. ELEMENTS OF HATE SPEECH POLICY

A hate speech policy which adequately reflects first amendment values will have a number of discernible yet related elements. The policy would be directed to preventing effects which an institution may legitimately find harmful or undesirable. Such effects may include the prevention of vio-

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100. *Banks v. Muncie Community Schools*, 433 F.2d 292, 298 (7th Cir. 1970). See also *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (university's withdrawal of financial support from official student newspaper which had a segregationist editorial policy, in absence of any student or faculty member complaint that the editorial policy incited harassment or interference, violated first amendment).

101. 563 F.2d 512 (2d Cir. 1977).

102. *Id.* at 517.

103. *Id.* at 519.

104. *Id.* This deference included the judgment that students in the eleventh and twelfth grades, as well as younger students, might suffer harm. It has been suggested that a school system may have a duty to protect students from the psychological harm of hate speech. Gyory, *The Constitutional Rights of Public School Pupils*, 450 FORDHAM L. REV. 201, 219 (1971).

105. Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 312-20, 331-39 (1989).

106. *University of California v. Bakke*, 438 U.S. 265, 313 (1978) (Powell J. for the Court).

107. *Id.* at 314-15.

lence, either as a reaction on the part of the targeted individual, or by third parties against the individual; the prevention of other conduct recognized to be unlawful by society at large or considered by an institution to be undesirable, such as discrimination against members of targeted groups or intimidation of students from full participation in the educational process; and/or the prevention of nonphysical injury, such as reputational injury or emotional distress.<sup>108</sup>

The policy would also reflect circumstances that will ensure a sufficiently strong causal relationship between the proscribed speech and the undesirable effect(s). Such circumstances may include reference to the location where the speech occurs, in order to provide greater protection to the "captive audience;" a requirement that the speech be face to face or directed at an individual or small group; and/or more of an objective standard in determining the likelihood that the undesirable effect(s) will occur.

The policy would also contain safeguards to minimize the proscription of communicative content of speech and to avoid conferring broad discretion on the factfinder in an individual case. These may include a fault or state-of-mind requirement as to the speaker, perhaps one which is more of a subjective standard, and/or a clear description of the type of speech which, in the first instance, would be deemed to involve a likelihood that the undesirable effect(s) will occur.

Finally, the policy would establish a range of sanctions which would give primacy to educational rather than punitive considerations.

The precise elements of the policy will depend upon certain foundational conclusions concerning the relevance to hate speech of the various facets of first amendment doctrine. Is the regulation of hate speech directed to the communicative

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108. There may also be strong symbolic significance to the restriction of hate speech. Kretzmer, *supra* note 22, at 456; Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988). However, governmental interests of a symbolic nature do not appear to have great force in first amendment jurisprudence. *U.S. v. Eichman*, 110 S. Ct. 2404; *see supra* note 78 and accompanying text. Moreover, as an interest, it provides little guidance in devising an appropriate hate speech policy. For these reasons, the important messages which are conveyed by the adoption of a hate speech policy, although confirming society's commitment to the other values and interests which have been identified, are not separately addressed in the balance of this discussion.

impact of speech, so that a more rigorous first amendment proving regimen is necessary? Must falsity be an element of the offense, or will other elements sufficiently safeguard first amendment interests? Is the "generic clear and present danger" approach evidenced in *Beauharnais* constitutionally valid, or must the policy require a demonstration of individual harm?

Hate speech almost always has some communicative value,<sup>109</sup> and, therefore, is entitled to some level of first amendment protection. However, as the expressive content becomes more emotive and less cognitive,<sup>110</sup> or when the purpose is to hurt and humiliate rather than to communicate facts or values,<sup>111</sup> the importance of the speech for first amendment purposes is substantially diminished. Moreover, when the content of speech is regulated because it interferes with some legitimate interest other than whatever emotional disturbance it may cause, as in the law of defamation or sexual harassment in the workplace, the less rigorous balancing approach is appropriate.<sup>112</sup>

Students subjected to hate speech will almost always be private figures. Therefore, neither *Falwell* in the area of emotional distress,<sup>113</sup> nor the Court's invasion of privacy cases,<sup>114</sup> necessarily require a showing of falsity.<sup>115</sup> However, if hate speech is considered to address a matter of public concern, the Court may well find that falsity, or some surrogate, is necessary to accommodate first amendment interests. Moreover, the defamation law concept of presumed damages cannot be applied to speech involving matters of public con-

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109. Greenawalt, *supra* note 14, at 143-45; Note, *supra* note 66, at 1775-77.

110. Smolla, *supra* note 2, at 185-86.

111. Greenawalt, *supra* note 14, at 145, 297.

112. Tribe, *supra* note 10, at 641; Smolla, *supra* note 10, at 441, 460-61, 471-73. Assuming the hate speech addresses a matter of public concern, and is directed to a private figure, Professor Smolla's "multi-tiered solution" would allow recovery for emotional distress when there is some fault "with regard to the risk of the *non-emotional distress* component of the injury." *Id.* at 466-67 (emphasis in original).

113. See *supra* notes 38-43 and accompanying text.

114. See *supra* notes 50-54 and accompanying text.

115. "Trials about truth could easily do much more damage than the original communications," and adopting a law limited to false assertions of fact "would be senseless." Greenawalt, *supra* note 6, at 306. See also Kretzmer, *supra* note 22, at 496.

cern, without a showing of falsity and "actual malice."<sup>116</sup>

The Court has yet to give significant content to the private concern/public concern distinction; however, it appears to be primarily a subject matter test.<sup>117</sup> Although the nature and extent of dissemination are relevant, they are not determinative.<sup>118</sup> The fact that certain views are expressed privately does not, in and of itself, establish that these views do not address a matter of public concern.<sup>119</sup>

Given the limited communicative value of hate speech, even if it is deemed to address a matter of public concern, its contribution to the marketplace of ideas is minimal.<sup>120</sup> Moreover, to the extent that hate speech is proscribed for reasons other than the resulting emotional distress *per se*—namely, its discriminatory and intimidating consequences—the balance of interests tilts decisively away from the speaker. Although surrogates will be desirable to safeguard first amendment interests, falsity should not be required, except perhaps for group libel.<sup>121</sup>

Similarly, as in the case of presumed damages, an individual demonstration that actual harm resulted from the hate speech should not be necessary. So long as the primary harm which is presumed is in the nature of individual, rather than societal, injury,<sup>122</sup> and a high degree of fault is, in fact, demon-

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116. See *supra* notes 27-31 and accompanying text.

117. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 786-87 (1984) (Brennan, J., dissenting).

118. *Id.* at 773 (White, J., concurring). Justice White's concurrence was necessary to the majority.

119. *Givhan v. Western Line Consol. School*, 439 U.S. 410 (1979). However, when the views are expressed privately, there may be greater latitude for control as legitimate time, place and manner restrictions. *Id.* at 415 n.4.

120. When speech addresses a matter of public concern "in only a most limited sense," its prohibition might be justified on the basis of a "reasonable belief" that it would disrupt governmental operations. *Connick v. Myers*, 461 U.S. 138, 154 (1983). Perhaps more significantly, all of the Supreme Court's pronouncements concerning individual injury and the first amendment concern speech *about* rather than *to* the individual, a distinction of importance in light of the public debate rationale of the defamation cases. *Le Bel, Emotional Distress, The First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315, 322-23 (1989).

121. "[T]he appropriate analysis readjusts the first amendment matrix governing defamation to reflect the different balance of social interests posed by emotional distress cases." Smolla, *supra* note 10, at 468. See also Note, *supra* note 66, at 1783, and *supra* note 36.

122. Thus distinguishing *Landmark Communications, Inc. v. Virginia*, 435 U.S.

strated,<sup>123</sup> the legislative determination should be sustained. Furthermore, unlike recovery for defamation or invasion of privacy, which is usually not justifiable by any interest other than compensation to the individual, the enduring effects of hate speech contribute to the weight on the prohibition side of the balance.<sup>124</sup> These longer-term societal effects themselves may be serious enough to justify restriction, without an individualized showing of harm in each case.<sup>125</sup>

All of these issues of first amendment impact, and particularly the question of individualized harm, must be illuminated by the interests of the educational process. It is quite clear that an educational institution, or at least a secondary school, may restrict speech by some students in order to protect the valid interests of other students, and there is no indication that the institution must await proof of actual harm.<sup>126</sup> As a general proposition, a student's susceptibility to harm, particularly emotional harm, may arguably be less by the time the student has reached the college or university level. Also, the relationship between the student and the institution may be different, as the institution may have less of a *parens patriae* role. In the case of hate speech, however, many college level students will not have had previous exposure that may build resistance. And *parens patriae* aside, the institution should retain responsibility for maintaining the integrity of the educational process.

#### A. *Harmful or Undesirable Effects*

##### 1. *Violence*

A hate speech policy which proscribes speech which is likely to produce immediate retaliation by a targeted individual is clearly consistent with the first amendment. Similarly, speech which is likely to incite imminent physical attack on one or more members of a targeted group may be prohibited. Although speech likely to result in such breach of the peace cer-

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829, 842-44 (1978). See *supra* note 53 and accompanying text.

123. Thus distinguishing *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989).

124. See *infra* notes 129 and 133 and accompanying text.

125. Greenawalt, *supra* note 14, at 301.

126. See *supra* notes 84-104 and accompanying text. For an argument that the suppression of hate speech would be justified in light of the special first amendment interests of children, see Carvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 333-51, 361-64 (1979).



tainly may be covered, a policy so limited would probably be redundant in light of existing institutional rules. In any event, such a policy fails to come to terms with those pernicious effects particular to hate speech.

The "fighting words" concept itself reflects a system designed to serve white males and any policy limited by its breach of the peace principle would be similarly deficient.<sup>127</sup> As with an incitement doctrine which focuses on the imminence of violent action, the "fighting words" concept ignores the relationship over time between hate speech and violence, a relationship recognized by the Court in *Beauharnais*.<sup>128</sup> Speech that carries a message of class based inferiority directly legitimizes subordination and violence. Indeed, stigmatization invites violence, for the stigmatization of the victim as a practical matter often precludes punishment of the perpetrator.<sup>129</sup> Hate crime legislation, including the Federal Hate Crime Statistics Act signed into law on April 23, 1990,<sup>130</sup> evidences the growing awareness that violence motivated by class based animus is different.

## 2. Discrimination

Beyond violence, a policy may be directed against class based discrimination. When the speech itself is the mechanism of discriminatory treatment, there is no doubt that it may be proscribed.<sup>131</sup> More broadly, however, the relationship be-

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127. Criticism of the "fighting words" standard is widespread. See, e.g., Matsuda, *supra* note 1, at 2355-56; Greenawalt, *supra* note 14, at 295-98 ("[I]t is not unlikely that they hurt those victims who feel defenseless and unable to fight more than those who actually fight back.").

128. See *supra* note 22 and accompanying text. The historical record demonstrates that "escalating racist speech always accompanies racist violence." Matsuda, *supra* note 1, at 2352 n.166. "[W]hile general studies showing the connection between racist speech and the spread of racial discrimination or racist violence are almost impossible to execute, there is no lack of individual cases in which the connection between speech and violence has been quite clear." Kretzmer, *supra* note 22, at 465.

129. Harry, *Derivative Deviance: The Cases of Extortion, FagBashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546 (1982) ("Derivative deviance is here defined as that subset of all victimizations which is perpetrated upon other presumed deviants who, because of their deviant status, are presumed unable to avail themselves of civil protection.").

130. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990). The new law requires the Department of Justice to collect data on crimes motivated by race, religion, national origin, or sexual orientation.

131. *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S.

tween speech and discrimination is similar to that between speech and violence. It may intimidate a targeted individual from full participation in the educational process, including extra-curricular activities. And it may incite others to deprive members of the targeted class of the benefits and privileges otherwise available through the institution. Particularly when the message of inferiority is delivered under circumstances which would suggest agreement by the institution, hate speech effectively denies the opportunity to learn.<sup>132</sup> Here again, the *Beauharnais* Court understood the relationship over time between speech and discriminatory treatment.<sup>133</sup>

Federal law provides a remedy for any conspiracy "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."<sup>134</sup> It is clear that this provision reaches purely private conspiracies, that is, those that do not in any way involve the state.<sup>135</sup> It is not clear, however, whether the law is limited to conspiracies motivated by racial bias.<sup>136</sup> Lower federal courts have denied its protection to homosexuals<sup>137</sup> and to women seeking abortions,<sup>138</sup> because these classes have not been designated by

376 (1973); *Long v. Valentino*, 216 Cal. App. 3d 1287, 265 Cal. Rptr. 96 (1989).

132. See *supra* notes 87-95 and accompanying text. Professor Smolla identifies the speech principles of the fourteenth amendment, and argues that the prevention of stigma, lying at the heart of equal protection analysis, qualifies as a compelling state interest. Smolla, *supra* note 2, at 198-202.

133. See *supra* note 36 and accompanying text. See also Kretzmer, *supra* note 22, at 462-65. These "long-term harms flow largely from the message the speaker wants to convey. Trying to prevent the harms is regulating speech because of its dangerous content." Greenawalt, *supra* note 14, at 148. Professor Lawrence goes further, and argues that *Brown v. Board of Education*, 347 U.S. 483 (1954), mandates the abolition of racist speech. Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-49. His view has been directly challenged. See Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 541-49.

134. 42 U.S.C. § 1985(3). See also 18 U.S.C. § 245 which makes it a crime for a person acting alone "by force or threat of force" to wilfully intimidate another person because of race, color, religion or national origin and because the person is attending a public college.

135. *Griffen v. Breckenridge*, 403 U.S. 88 (1971).

136. *United Bd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 835 (1983). See generally Gorniley, *Private Conspiracies and the Constitution: A Modern Version of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527 (1985).

137. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979).

138. *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168, 1171

the courts as suspect or quasi-suspect for purposes of equal protection analysis. Moreover, Congress has not indicated through legislation that they are in need of special protection. As to homosexuals, recent passage of the Federal Hate Crimes Statistics Act may today lead the courts to a different conclusion.

In applying the first amendment, can a compelling interest be recognized in the protection of a group against discrimination or intimidation when that group has no special status for equal protection analysis? In *Bowers v. Hardwick*,<sup>139</sup> the Court upheld Georgia's criminalization of homosexual sodomy against a challenge based upon the "right to privacy" found in the due process clause. After determining that there is no "fundamental right to engage in homosexual sodomy,"<sup>140</sup> the Court held that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" provides a sufficiently "rational basis" to sustain the law.<sup>141</sup>

The Court in *Bowers* did not consider the constitutionality of the statute under the equal protection clause.<sup>142</sup> However, a number of federal appellate courts have since concluded that homosexuality is not a suspect or quasi-suspect class for purposes of equal protection analysis.<sup>143</sup> A statutory classification which is suspect (based on race, national origin or alien-

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(C.D. Cal. 1989). *But see* New York Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

139. 478 U.S. 186 (1986).

140. *Id.* at 190-91.

141. *Id.* at 196.

142. *Id.* at 196 n.8. For an equal protection clause analysis of same-sex sodomy statutes, see *Developments, Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1525-31 (1989).

143. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *but see*, *Watkins v. United States Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 36-37 (D.C. 1987) (dictum). *See also* *Developments, supra* note 142, at 1564-71; Note, *The Constitutional Status of Sexual Orientation: Homosexuality As a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Note, *Homosexuals and Heightened Scrutiny After Bowers v. Hardwick*, 31 B.C.L. REV. 375, 455-74 (1990).

age) will be subjected to "strict scrutiny" under the equal protection clause, and sustained only when it is narrowly tailored to achieve a compelling state interest. A classification which is quasi-suspect (based on gender or illegitimacy) will be subject to "intermediate scrutiny," and sustained when it is substantially related to an important state goal.<sup>144</sup>

Whether or not homosexuals are entitled to special protection under the equal protection clause, a governmental interest in preventing discrimination or intimidation on the basis of sexual orientation should be recognized as compelling for purposes of the first amendment. In *Gay Rights Coalition v. Georgetown University*,<sup>145</sup> the District of Columbia Court of Appeals held that the District's compelling interest in the eradication of sexual orientation discrimination required Georgetown, despite its religious objections, to obey a mandate, found in the District of Columbia Human Rights Act, that the University provide to a gay student organization the same tangible benefits provided to other student groups.<sup>146</sup> The court summarized the compelling interest that a state has in eradicating sexual orientation discrimination as including "the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all."<sup>147</sup> The court found that "[d]espite its irrelevance to individual merit," sexual orientation discrimination exists "in all walks of life, ranging from employment to education."<sup>148</sup> Moreover, "social prejudice sometimes takes the form of unprovoked attacks on those perceived to be gay."<sup>149</sup> The court noted that, in addition to

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144. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-42 (1985).

145. *Gay Rights Coalition*, 536 A.2d 1 (D.C. 1987).

146. *Id.* at 31-39.

147. *Id.* at 37.

148. *Id.* at 35. See also *Developments*, *supra* note 142, at 1554-57, 1575. Gay and lesbian students may be particularly alienated from their peers. *Id.* at 1602 n.125, citing A. Bell, M. Weinberg & S. Hammersmith, *SEXUAL PREFERENCES*, 95, 163 (1981).

149. *Gay Rights Coalition*, 536 A.2d at 36. See also *Developments*, *supra* note 142, at 1541-42. An annual survey by the National Gay and Lesbian Task Force "documented 7,031 hate-motivated incidents against gays in 1989, ranging from harassment to homicide." Herscher, *S.F. Again Tops U.S. in Reports of Gay Bashing*, *San Francisco Chronicle*, June 7, 1990, at A4, col. 4. In 1990, the total number of re-

the District, legislative or executive protection against sexual orientation discrimination had been adopted in other states, cities and counties.<sup>150</sup>

In the one case which addresses a university hate speech policy, *Doe v. University of Michigan*,<sup>151</sup> the court noted the absence of "federal statutory or constitutional provisions against discrimination on the basis of sexual orientation or Vietnam Veteran's status," but that "does not mean that the University may not adopt regulations more protective than existing law . . . ." <sup>152</sup> Like the University of Michigan, the hate speech policies proposed or promulgated by other institutions are not limited to those groups which have been granted special status under the equal protection clause. Individuals protected belong to classes defined by sex, race, color, religion, ethnicity, national origin, ancestry, alienage, age, marital status, handicap, disability, creed, as well as sexual orientation and Vietnam veteran status.<sup>153</sup>

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ported anti-gay incidents in a half-dozen major U.S. cities increased 42 percent. Fernandez, *Antigay Attacks Surging in S.F.*, San Francisco Examiner, March 6, 1991, at A1, col. 5. Bias-crime statutes in a number of states and the District of Columbia expressly include crimes motivated by the sexual orientation of the victim. D.C. CODE ANN. § 22-4001 (1981 & Supp. 1990); ILL. ANN. STAT. ch. 38, §§ 110-15 (1980 & Supp. 1990); MINN. STAT. § 609.2231 Subd. 4 (1987 & Supp. 1990); NEV. REV. STAT. § 207.185 (1989). For a description of student discriminatory harassment based upon "sexual preference", see Note, *Student Discriminatory Harassment*, 16 J. OF C. & UNIV. L. 311, 313 (1989).

150. *Gay Rights Coalition*, 536 A.2d at 33 n.24. See also *Developments, supra* note 142, 1667-68; Mecker, Dombrink & Geis, *State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation*, 10 U. DAYTON L. REV. 745 (1985); Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 LAW & INEQUALITY 441 (1989).

151. *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

152. *Id.* at 861 n.11. See Note, *supra* note 108, at 693 n.74, contending that the "communitarian" justification for group libel laws would support inclusion of "sexual preference," and Smolla, *supra* note 2, at 171 n.1, assuming, with respect to inclusion of "sexual preference," that the "constitutional analysis would not be altered appreciably as the nature of the victimization changes."

153. See, e.g., ACLU-NC Policy Concerning Racist and Other Group-Based Harassment on College Campuses ("ACLU-NC Policy", Appendix A); University of California/Office of the President, Universitywide Student Conduct: Harassment Policy ("U.C. Policy", Appendix B); Stanford University, Interpretation of Fundamental Standard ("Stanford Policy", Appendix C); University of Michigan Policy on Discrimination and Discriminatory Harassment ("University of Michigan Policy", Appendix D); University of Wisconsin (see Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech*, 16 J. OF C. & UNIV. L. 573, 585 (1990)). Of these, only the U.C. Policy is non-exclusive in its listing of protected categories. For a general criticism of the ACLU-NC Policy by a self-professed

### 3. Emotional Distress

A broad hate speech policy will attempt to protect those targeted from the harmful mental and emotional effects of the speech in and of itself. Hate speech produces in the target a range of mental and emotional distress, including feelings of guilt, shame, anxiety, fear, vulnerability, inferiority, inadequacy, and personal degradation.<sup>154</sup> The state has a strong interest in compensating the individual for serious emotional distress.<sup>155</sup> Common law and statutory bases exist which provide a foundation for imposing liability for the infliction of emotional distress. This authority has been used to redress hate speech.<sup>156</sup>

Taking *Chaplinsky* at face value, words which in and of

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"card-carrying member," see Rohde, *Crafting Campus Speech Codes/Any Limitations Are Bound to Violate the 1st Amendment*, San Francisco Daily Journal, July 19, 1990, at 4, col. 5. The national board of the ACLU seems to take a different view from its California affiliates. Hentoff, *Saving the ACLU from Drowning*, San Francisco Daily Journal, Nov. 19, 1990, at 4, col. 3. A Policy Statement adopted by the ACLU National Board of Directors on October 13, 1990 appears in Strossen, *supra* note 133, at 571-73. The ACLU's General Counsel has expressed the opinion that the ACLU-NC Policy "might pass constitutional muster as a facial matter." *Id.* at 520-21 n.177. But she believes that the Stanford Policy and that adopted by the University of Wisconsin are unconstitutional. *Id.* at 497 n.61, 524-30. Professor Lawrence appears to believe that the Stanford Policy is constitutional. Lawrence, *supra* note 133, at 450.

154. Emotional distress may be manifested in physiological symptoms, and have long-term psychological and behavioral effects. Matsuda, *supra* note 1, at 2336-38; Delgado, *supra* note 2, at 13549; Kretzmer, *supra* note 22, at 466.

155. See *supra* notes 29-31 and accompanying text. In addition to defamation, damages for mental and emotional distress are awarded to remedy invasion of the interest in dignity in numerous actions at common law, including assault and invasion of privacy. Delgado, *supra* note 2, at 144 n.57; Amdursky, *The Interest In Mental Tranquility*, 13 BUFF. L. REV. 339 (1963).

156. See, e.g., *Agarwal v. Johnson*, 25 Cal. 3d 932, 946, 603 P.2d 58, 66, 160 Cal. Rptr. 141, 149 (1979) ("A prima facie case requires: '(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress . . . .'; Delgado, *supra* note 2, reviewing cases, at 150-65, and arguing that "an independent tort action for racial insults is both permissible and necessary," at 134; Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990), reviewing cases and arguing that Section 46, RESTATEMENT (SECOND) OF TORTS, with modifications should be the basis for "vindicating the rights of the victims of discriminatory speech". But "[t]raditional civil libertarians caution that the intentional infliction of emotional distress theory should almost never apply to verbal harassment." Strossen, *supra* note 133, at 515.

themselves cause serious emotional distress "by their very utterance cause injury."<sup>157</sup> Like defamatory false statements, words which in and of themselves cause serious emotional distress can be considered forms of non-speech, which may be proscribed without any cause for first amendment concern.<sup>158</sup> Even though defamatory false statements have, since *Chaplinsky*, been given some measure of protection in order to avoid inhibiting true speech, they may, with appropriate safeguards, be proscribed by civil liability.<sup>159</sup> Similarly, to the extent that words which injure *per se* may, on occasion, be deemed to have the characteristic of true speech, in other words, some minimal communicative content,<sup>160</sup> certain appropriate safeguards allow their proscription.

In order to proscribe speech solely for its *per se* harmful effect on an individual, it is not necessary to abandon first amendment precedent and adopt a "non-neutral, value-laden approach."<sup>161</sup> Hate speech, like violence and falsity, distorts the marketplace of ideas, and may be prohibited, not despite the values of the first amendment, but because of them.

Certain hate speech policies describe the prohibited speech by using the characterization "fighting words," and quoting or paraphrasing the *Chaplinsky* formulation, even though neither breach of the peace, nor the emotional reaction *per se* of the target, is the apparent focus of the policy. "Fighting words" are defined in the policies by reference to class based animus,<sup>162</sup> and their use is proscribed by reference to intimidation and harassment.<sup>163</sup>

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157. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). See *supra* notes 12-14 and accompanying text.

158. See *supra* notes 32-33 and accompanying text; see *supra* notes 109-11 and accompanying text.

159. See *supra* notes 27-34 and accompanying text.

160. The court in *Collin v. Smith*, 578 F.2d 1197, 1203, suggested that if Nazi symbols were deemed to assert Nazi ideology, they were to be treated as constitutionally protected opinion, and not mere false fact.

161. Matsuda, *supra* note 1, at 2357.

162. The U.C. Policy, Appendix B, defines "fighting words" as including "those terms widely recognized to be derogatory references" to specified class characteristics "and other personal characteristics." The Stanford Policy, Appendix C, defines "fighting words" in part as those "commonly understood to convey direct and visceral hatred or contempt for human beings based upon" membership in a protected class. The "fighting words" doctrine provided key elements to the University of Wisconsin policy, but the policy does not use the phrase. Hodulik, *supra* note 153, at 583.

163. Under the U.C. Policy, Appendix B, "fighting words" are prohibited when

Other policies make no use of the term "fighting words" or the *Chaplinsky* formulation. These policies define the prohibited speech directly by reference to class based animus<sup>164</sup> and likewise, describe the proscribed effects as intimidation and/or harassment.<sup>165</sup>

The use of "fighting words" as the centerpiece of a hate speech policy clearly signals an institution's intent to limit the scope of the policy to the boundaries of regulation under the first amendment. Reformulating the "fighting words" concept to specifically reference the protected classes would presumably ensure that the purpose of the policy is understood. However, such an approach is problematic and ultimately unsatisfactory. It carries with it the deficiencies of the "fighting words" concept as an operative first amendment principle in this context.<sup>166</sup> It at least raises a question as to whether some tendency to violent action or reaction must be demonstrated for application of the policy. And, even when qualified by reference to participation in institutional programs and activities, it may fail to sufficiently reflect the goals and values of the institution.

#### B. *Causal Relationship/Speech and Effects*

The policy should articulate a causal relationship between

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they constitute "harassment," which in turn is defined as creating a "hostile and intimidating environment which . . . will interfere with the victim's ability to pursue his or her education or otherwise to participate fully in University programs and activities." The Stanford Policy, Appendix C, speaks variously of "harassment by personal vilification," "discriminatory harassment," and "discriminatory intimidation by threats of violence." Persuasive arguments support the proposition that intimidation which is coercive or manipulative is outside the scope of the first amendment. GREENAWALT, *supra* note 14, at 249-59; Comment, *Coercion, Blackmail, And the Limits of Protected Speech*, 131 U. PA. L. REV. 1469 (1983).

164. The ACLU-NC Policy, Appendix A, would prohibit speech which "is specifically intended to and does harass . . . on the basis of" membership in a protected group. The University of Michigan policy, Appendix D, proscribed speech "that stigmatizes or victimizes . . . on the basis of" a class characteristic.

165. The ACLU-NC Policy, Appendix A, speaks of a "hostile and intimidating environment which . . . will seriously and directly impede . . . educational opportunities." The University of Michigan policy, Appendix D, also spoke of "an intimidating, hostile or demeaning environment," "academic efforts," "educational pursuits" and "participation in University sponsored extra-curricular activities."

166. See *supra* notes 127-30 and accompanying text. See also Koepke, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 COMM-ENT 599, 610-14 (1990).



the proscribed speech and the effect(s) which an institution deems harmful or undesirable. Where the "fighting words" formulation appears in the policy, the causal relationship will be incorporated.<sup>167</sup> Otherwise, the policy will either require that the effect has occurred or that there is some specified degree of likelihood that the effect will occur.<sup>168</sup>

In addition to articulating a causal relationship, the policy must reflect circumstances that will ensure that the relationship will exist in the individual case.<sup>169</sup> The location in which hate speech occurs is clearly related to the likelihood of producing an intimidating effect or emotional distress, as well as affecting the balance of first amendment and other institutional interests.<sup>170</sup> The policy, therefore, may express greater concern with speech which occurs in a dormitory or classroom, or where there otherwise is a "captive audience," than with speech which occurs at scheduled rallies and public addresses, the subject of which have been previously advertised.<sup>171</sup>

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167. The U.C. Policy, Appendix B, modifies the formulation, and, therefore, the causal relationship ("inherently likely to provoke a violent reaction whether or not they actually do so"). Stanford Policy, Appendix C ("which by their very utterance inflict injury or tend to incite to an immediate breach of the peace").

168. Compare ACLU-NC Policy, Appendix A ("does harass" and "creates a hostile and intimidating environment which . . . will seriously and directly impede") with University of Michigan Policy, Appendix D ("has the . . . reasonably foreseeable effect of interfering"). Note that both the ACLU-NC Policy and the University of Michigan Policy, as well as the U.C. Policy, seem to articulate different causal relationships at different points in the policy. Such differences, if principal, should be clearly articulated and explained, so as to avoid uncertainty in interpretation and application.

169. A strict requirement of proof of causal connection may substantially hinder the effectiveness of the policy. See discussion of experience under British statute in Kretzmer, *supra* note 22, at 506. However, the causation element itself has first amendment significance. Shauer, *Mrs. Palsgraff and the First Amendment*, 47 WASH. & LEE L. REV. 161 (1990).

170. See *supra* note 81 and accompanying text. The U.C. Policy, Appendix B, applies "on University property, or other property to which these policies apply as defined in campus implementing regulations, or in connection with official University functions or University sponsored programs." Such a policy would be less subject to first amendment challenge than one which applies to students or other institutional personnel at all times and places.

171. See, e.g., University of Mich. Policy, Appendix D. Students in a college classroom were found to constitute a "captive audience" by a court considering whether the professor's use of profanity could be disciplined. *Martin v. Parrish*, 805 F.2d 583, 586 (5th Cir. 1986). A "captive audience" might be found in an otherwise public place. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (plurality opinion), 307-8 (concurring opinion) (1974) (public transit system). It has been argued that, consistent with the first amendment, one may be protected

Similarly, a requirement that the speech be face to face or directed at a certain individual or a small group of individuals would provide some assurance that the only speech which will be prohibited is that which has the requisite causal relationship with the undesirable effect(s).<sup>172</sup> Anonymity of the speaker would presumably not preclude a finding that the speech has been sufficiently targeted. On the other hand, a targeting requirement would preclude a prohibition on speech which has no effect other than lending to the creation of a "hostile environment."<sup>173</sup>

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from extreme and outrageous language in the home and workplace, as well as "other areas where the recipient found it necessary to be, such a food and clothing stores, and possibly restaurants." Note, *supra* note 66, at 1769-72. See also Koepke, *supra* note 166, at 616-18.

172. See ACLU-NC Policy, Appendix A ("harass an individual or specific individuals" and "addressed directly to the individual or individuals whom it harasses"); and Stanford Policy, Appendix C ("insult or stigmatize an individual or a small number of individuals" and "addressed directly to the individual or individuals whom it insults or stigmatizes"). Professor Matsuda argues that "[t]he lack of individual targeting does not guarantee a lack of individual harm." Matsuda, *supra* note 2, at 2372 n.256. The targeting requirement also runs the risk of ignoring the harmful effects of hate speech against non-target group members who associate with target groups. *Id.* at 2338 n.91. And Professor Smolla cautions against "adopting a per se rule prohibiting penalties for racist and sexist speech aimed at groups." Smolla, *supra* note 2, at 204-05. However, targeting may be constitutionally required. See Rabinowitz, *supra* note 14, at 266; Note, *supra* note 66, at 1773 n.128; Hodulik, *supra* note 153, at 584. Even if targeting is not constitutionally required, the direct and immediate harm which can be caused by targeted racial vilification distinguishes it from "general group libel and racial slurs" for first amendment purposes. Downs, *supra* note 64, at 664-65. See also *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) ("The type of picketers banned by the . . . ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way.").

173. The University of Michigan Policy, Appendix D, may have prohibited speech which had only the effect of creating a "hostile environment." The University of Wisconsin policy is based upon "hostile environment." Hodulik, *supra* note 153, at 577-78, 582. The Wisconsin policy has also been challenged as violative of the first amendment. *Id.* at 573. For an argument that a campus hate speech policy based upon existing "hostile environment" harassment jurisprudence can withstand first amendment scrutiny, and proposing "model language," see Note, *The Call for Campus Conduct Policies: Censorship or Constitutionality Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 205, 220-31 (1990). Professor Karst states that the UC Policy, see Appendix B, "seems less vulnerable to constitutional attack" than the University of Michigan policy, noting that the UC policy "bears a strong analogy to the definition of racial harassment in employment that courts have developed in interpreting both state and federal civil rights laws." Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 135 n.162. For a discussion of the application of the first amendment (and, specifically, the overbreadth and vagueness doctrines) to the pro-

In determining the likelihood that the undesirable effect(s) will occur, the policy should provide for an application of an objective standard. For example, the prohibited speech has been defined as that which is "commonly understood to convey direct and visceral hatred or contempt,"<sup>174</sup> and as including words which are "widely recognized to be derogatory."<sup>175</sup> However, if the purpose of the standard is to determine the likelihood of effect on a targeted individual, rather than to establish a fault or state of mind requirement applied to the speaker,<sup>176</sup> then the standard should look to what can reasonably be expected to be a reaction in members of the targeted group rather than the society at large.<sup>177</sup> Moreover, the preferable focus would be on that reaction as related to the undesirable effect, rather than as a description of the prohibited speech.

### C. *First Amendment Safeguards*

The state of mind of the speaker, rather than a targeted individual, can effectively serve as a basis for an additional safeguard that the policy will not unduly interfere with first amendment values. The addition of a state-of-mind or fault element to the policy reflects first amendment jurisprudence in both the incitement<sup>178</sup> and defamation<sup>179</sup> areas. The policy may require intent on the part of the speaker,<sup>180</sup> or merely

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hibition of sexual or racial harassment in the workplace, see Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 421-28.

174. Stanford Policy, Appendix C.

175. U.C. Policy, Appendix B.

176. See *infra* notes 178-84 and accompanying text.

177. The reaction of target group members to hate speech is different from the reaction of non-target group members. Matsuda, *supra* note 2, at 169-70. In the tort action for intentional infliction of emotional distress, a plaintiff's heightened susceptibility will not preclude recovery when the defendant is aware of it. *Id.* at 170 n.220. In the "fighting words" context, the focus is on "an average addressee." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). "[A] female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison v. Brady*, 91 Daily Journal D.A.R. 1547, 1550 (9th Cir. 1991).

178. See *supra* note 17-18 and accompanying text.

179. See *supra* text accompanying notes 27-31 and notes 37-40.

180. ACLU-NC Policy, Appendix A ("specifically intended to . . . harass an in-

fault through negligence.<sup>181</sup> However, if the undesirable effects addressed by the policy include the emotional distress *per se* of a targeted individual, only an intent requirement would be clearly consistent with both general civil law<sup>182</sup> and first amendment precedent.<sup>183</sup>

An additional first amendment safeguard would be found in the creation of a catalogue containing the type of speech which, in the first instance, would be deemed to involve a likelihood that the undesirable effect(s) will occur.<sup>184</sup> Such a catalogue would provide clear notice as to particular words which would call the policy into play, and would provide some con-

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dividual"); and Stanford Policy, Appendix C ("intended to insult or stigmatize"). See also Delgado, *supra* note 2, at 145, arguing that most people know that certain words are only calculated to wound, and that there is no other use for them; therefore, "[t]he intentionality of racial insults is obvious." An intent requirement for conviction under a British hate speech statute "made it almost impossible to convict purveyors of racist speech." Kretzmer, *supra* note 22, at 501.

181. ACLU-NC Policy, Appendix A ("reasonably knows or should know will . . . impede"); U.C. Policy, Appendix B ("as a matter of common knowledge, inherently likely to provoke a violent reaction;" and "which the student uttering them should reasonably know will interfere"); University of Michigan Policy, Appendix D ("purpose or reasonably foreseeable effect of interfering").

182. Civil liability for the infliction of emotional distress *per se* requires intent or recklessness. See *supra* note 156.

183. In the defamation context, the speaker must have "in fact entertained serious doubts" as to the truth of the publication. *St. Amant v. Thompson*, 390 U.S. 727 (1968). Professor Le Bel argues that "a fault element focusing only on the state of mind of the defendant with regard to causing harm to the plaintiff provides an insufficient shield for speech that should receive constitutional protection." Le Bel, *supra* note 120, at 334. However, Edward M. Chen, ACLU-NC Staff Counsel, contends that: "Requiring intent . . . eliminates vagueness and overbreadth . . . [P]urposeful intent to discriminate implicates maximum equal protection interests." Koepke, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 Comment 593, 598 (1990) (Chen, Preface). See also Frisby v. Schultz, 487 U.S. 474, 498 (1988) (Stevens J., dissenting) ("I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected.").

184. The ACLU-NC Policy, Appendix A, suggests "specific illustrations of expected occurrences which demonstrate when the policy does or does not apply." When proposed, the Stanford Policy, Appendix C, was accompanied by comments which listed the kinds of expression covered "not exhaustively, and with apologies for the affront involved even in listing them" as including "'nigger', 'kike', 'faggot', and 'cunt'; symbols such as K.K.K. regalia directed at African-American students, or Nazi swastikas directed at Jewish students." Listing specific terms would help emphasize the focus and justification for the policy. "There is a qualitative difference historically, socially, and psychologically between being called an 'asshole' and a 'nigger.' The latter is not only offensive, it is oppressive." Koepke, *supra* note 183, at 596 (Chen, Preface).

trol over the discretion of the fact finder in a process of applying the policy to individual cases. The catalogue may be in addition to, or in lieu of, more generic descriptions of the type of speech considered likely to produce the undesirable effect(s).

Additional safeguards may be procedural<sup>185</sup> rather than substantive, and include an exacting standard of proof,<sup>186</sup> as well as public proceedings at the option of the respondent. Open proceedings would also serve the primarily educational, rather than punitive, goals of the policy, and help build consensus in the community on the interpretation and application of the policy. The consequences of a violation, particularly a first violation, should also reflect the educational purposes. Community service, perhaps with a class based campus student organization, might be the preferred sanction.<sup>187</sup>

As a matter of policy, the interests of the individuals and groups in need of protection of a hate speech policy, and the values which inhere in the first amendment, are overlapping and are, to that extent, consistent. The first amendment is a necessary tool for those who are not in positions of governmental or institutional control; disruptive speech is considered by some such outsiders as a legitimate form of political and social protest.<sup>188</sup> Indeed, some members of the protected groups may consider a hate speech policy to be, at best, patronizing and paternalistic, and, at worst, a contributor to an institutionalization of class based victimization and stigma.

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185. The ACLU-NC Policy, Appendix A, requires that it be enforced "in a manner consistent with due process protections . . . proportionate to the gravity of the violation."

186. In the defamation context, proof must be "clear and convincing," at least when the plaintiff is a public official or public figure. *Supra* note 27 and accompanying text.

187. The nature of the sanctions also affects the first amendment consequences. It has been argued that "more severe harms are required to justify criminal punishment than to warrant civil liability;" and that "a degree of vagueness and open-endedness [is permitted] in a standard for civil recovery" than would be acceptable in a criminal provision. GREENAWALT, *supra* note 14, at 293, 319-21. See also Koepke, *supra* note 166, at 619, concerning due process and proportionate punishment.

188. See, e.g., Note, "Offensive Speech" and the First Amendment, 53 B.U.L. REV. 834, 854 (1973), concerning use of offensive words by the Black Panthers. But Professor Lawrence states that "[i]t is difficult for us to believe that we should fight to protect speech rights for racists because that will ensure our own speech rights." Lawrence, *supra* note 133, at 466-67.

Moreover, speech which might be covered by the policy (at least when not anonymous) allows for the self-identification of bigots, and might provide a safety valve for otherwise more harmful emotions.<sup>189</sup>

On the other hand, a hate speech policy could itself be a safeguard for first amendment values. In the absence of a clearly articulated, specific, and carefully designed policy, the interpretation and application of broad codes of conduct will be inherently arbitrary, and potentially more inhibiting of expression. Standards such as "respect for . . . the rights of others as is demanded of good citizens,"<sup>190</sup> when applied to speech or expressive conduct, invite the repression of unpopular ideas.<sup>191</sup>

### III. PROPOSED HATE SPEECH POLICY

#### A. *Statement of Policy*

A student<sup>192</sup> who intentionally or recklessly uses hate speech, under such circumstances that another student is likely to suffer serious emotional distress or be intimidated from full participation in any university activity or program, shall be disciplined. A student shall not be disciplined under this Policy for any conduct which s/he demonstrates has serious literary, artistic, political or scientific value.

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189. But see Delgado, *supra* note 2, at 140 and sources cited n.39 ("There is little evidence that racial slurs serve as a 'safety valve' for anxiety which would otherwise be expressed in violence."); and Kretzmer, *supra* note 22, at 487 (There is "no evidence" to support the "general conclusion that suppression of speech inevitably leads to violence.").

190. Stanford Policy, Appendix C.

191. More generally, restriction of hate speech appears consistent with certain of the important values which have been identified as lying at the foundation of the first amendment. See Delgado, *supra* note 2, at 175-79. "Speech that preempts further speech rather than inviting response [i.e., hate speech] does not serve the purposes of the first amendment and is therefore less deserving of protection." Lawrence, *supra* note 133, at 454 n.92.

192. This policy does not address the circumstances under which the institution might discipline faculty members or staff. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). However, where speech by a student may be disciplined under the proposed policy, it could almost certainly be disciplined in the case of a faculty or staff member.

B. *Definition/Principles of Interpretation and Application*

1. "Hate speech" is any word, gesture, graphic representation, or symbol which reflects hatred, contempt, or stigmatization by reason of race, ethnicity, national origin, gender, religion, handicap or sexual orientation.
2. The following are presumed to constitute "hate speech": ["nigger," "kike," "cunt," "faggot," "wop," "spic," "gook," K.K.K. regalia].<sup>193</sup> However, a student shall be permitted to demonstrate that, under the particular facts and circumstances, characterization as hate speech is inappropriate.
3. A student acts intentionally when s/he desires a particular effect to occur or knows that the effect is certain, or substantially certain, to occur. A student acts recklessly when s/he deliberately disregards a high degree of probability that a particular effect will occur.<sup>194</sup>
4. Hate speech which is comprised of, includes, or is part of a threat of physical harm to person or property, or a specific discriminatory act, shall be presumed to be used intentionally or recklessly. However, a student shall be permitted to demonstrate that, under the particular facts and circumstances, the requisite state of mind was not present.
5. Hate speech which has a strong tendency to result in physical harm to person or property, or in a specific discriminatory act, shall be presumed to be likely to cause serious emotional distress or intimidation. However, a student shall be permitted to demonstrate that, under the particular facts and circumstances, a requisite effect was not likely to occur.
6. In determining whether hate speech is likely to cause serious emotional distress or intimidation, the applicable standard

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193. There are divergent views on whether a member of a minority or historically subjugated group should be subject to sanction for hate speech directed at a member of a majority or historically dominant group. See Matsuda, *supra* note 2, at 2361-63; Kretzmer, *supra* note 22, at 511; GREENAWALT, *supra* note 14, at 147 ("Honkey" hurts a lot less than 'nigger' and 'WASP' hurts a lot less than 'kike'."); Koepke, *supra* note 166, at 618-19. It is this author's view that the circumstances of the case should govern, and that such circumstances may properly result in the sanctioning of a minority student. This approach may be necessary to avoid unconstitutional viewpoint discrimination. Strossen, *supra* note 133, at 506-07.

194. These formulations are based on those found in RESTATEMENT (SECOND) OF TORTS § 46, comment (i) (1965) concerning the intentional infliction of emotional distress.

shall be the likely effect on a student of ordinary sensibilities who shares the class-defining characteristic.

7. This Policy applies on all university property, and during all university activities and programs whether or not conducted on university property.<sup>195</sup>

8. In determining whether any element of an offense under the Policy is established, the following additional factors are particularly relevant:

(a) Whether or not the student's conduct is directed to a specific individual, a small number of specific individuals, or a large number of specific individuals.

(b) Whether or not the student's conduct is part of a pattern of vilification, harassment, intimidation, or discrimination.<sup>196</sup>

(c) Whether or not the student's conduct occurs during classroom instruction, or in a dormitory, library, laboratory or other research center.<sup>197</sup>

9. In determining whether conduct has serious literary, artistic, political or scientific value, the applicable standard shall be the reasonable member of the university community.

The legal and policy rationales for the various elements of the proposed policy should be clear from the previous discussion.<sup>198</sup> However, certain aspects of the proposal warrant

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195. The institution's interests extend beyond the borders of the campus to the arena of any school sponsored activity. *Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260 (1988). See *supra* notes 89-90 and accompanying text; Gyory, *supra* note 104, at 252.

196. *The Model Communicative Torts Act*, 47 WASH. & LEE L. REV. 1, 36 (1990), would require a "pattern of communication evincing a continuity of purpose." Current tort law does not require proof of a pattern of communication in cases of racial or ethnic harassment, but there is such a requirement for verbal sexual harassment. Love, *supra* note 154, at 131, 135. In the "hostile workplace environment" context, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady*, 91 Daily Journal D.A.R. 1547, 1549 (9th Cir. 1991). See also Note, *supra* note 173, at 235, arguing that a single act may validly be sanctioned under a university hate speech policy.

197. Even as to university facilities which might properly be characterized as a "public forum," "content-based exclusions" may be justified by a compelling state interest when the exclusion is "narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

198. For other formulations of the circumstances under which "hate speech" may constitutionally be protected, see *The Model Communicative Torts Act*, *supra* note 196; Smolla, *supra* note 2, at 210-11; Rabinowitz, *supra* note 14, at 279;



more focused consideration. The value formulation which appears, in the nature of a defense, as part of the Statement of Policy is taken from the Court's definitional approach to obscenity,<sup>199</sup> one of the categories of unprotected speech. It is considered to be more workable than distinctions based upon ideas or opinion, and more suitable to the focus of the policy and the educational setting. Similarly, the reasonable person standard, also applicable in the obscenity context,<sup>200</sup> is modified in the proposed policy to reflect the educational setting.

The inclusion of the value formulation should serve as a sufficient fail safe mechanism for first amendment purposes. However, even in the nature of a defense, this additional element creates a risk that the policy will prove less effective in application. In part for this reason, the proposed policy eschews the "taken as a whole" element of the obscenity formulation.<sup>201</sup> Moreover, the value judgment should be made without reference to the speaker's interest in the emotive quality of the speech.<sup>202</sup>

The proposed policy is appropriate for secondary schools and higher level educational institutions. Although recognizing the concerns which led Professor Smolla to draw a distinction for these purposes,<sup>203</sup> this author believes that, whatever caution the first amendment might counsel in treating these institutions in a similar manner,<sup>204</sup> the proposed policy is suffi-

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Downs, *supra* note 64, at 684; Koepke, *supra* note 166, at 621. See also as to emotional distress generally, Le Bel, *supra* note 120, at 351. Descriptions of university hate speech policies which have been adopted by some public and private institutions can be found in Note, *supra* note 173, at 208-09, and Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1375-77 n.137, 1379-80 (1990). The applicability of federal and state constitutional provisions to private university hate speech policies is considered in Comment, *supra*, at 1382-87, 1394-98.

199. *Miller v. California*, 413 U.S. 15, 23-24 (1973).

200. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

201. A persuasive argument can be made that, once hate speech is determined to be unprotected, the fact that it may be "alongside good speech" should not provide any first amendment immunity. Downs, *supra* note 64, at 658.

202. See *supra* notes 110-11 and accompanying text.

203. Professor Smolla would restrict "racist attacks on groups" at secondary schools wherever on school grounds they might occur. At colleges, restrictions would be limited to "classroom instruction, or in other settings directly involving the university's institutional mission but not in university settings that are part of the 'general marketplace' of university discourse." Smolla, *supra* note 2, at 23-24 (emphasis in original). See also Strossen, *supra* note 133, at 503-05.

204. See text accompanying note 126 and discussion thereafter and notes 23-24,

ciently protective of first amendment interests that similar treatment is justified.

#### IV. CONCLUSION

It is unlikely that a hate speech policy can be formulated which is sensitive to the interests of free expression and equality, yet fully satisfactory to committed spokespersons for those interests. Neither those who maintain strong first amendment positions nor civil rights activists can be truly comfortable with the accommodations necessarily made to the competing, if not conflicting, values. Indeed, there is a serious threat that a hate speech policy will be formulated or implemented so as to undermine both sets of values.

Such a result, however, is not inevitable. Hopefully, over time, there will be fewer and fewer occasions for applying the policy, a reflection of true progress toward a just society. However, if this is not possible, the area of uncertainty inherent in any policy—the result, in part, of necessary flexibility—should narrow as consensus develops regarding speech which truly harms and has no value.

## APPENDIX A

ACLU-NC POLICY CONCERNING RACIST AND OTHER  
GROUP-BASED HARRASSMENT ON COLLEGE CAMPUSES

Campus administrators are obligated to take all steps necessary within constitutional bounds to minimize and eliminate a hostile educational environment which impairs access of protected minorities to equal educational opportunities. Campus administrators must: speak out vigorously against expressions of hatred or contempt based on race, color, national or ethnic origin, alienage, sex, religion, sexual orientation or disability; promote equality and mutual accommodation and understanding among these groups and the balance of the community (including steps to assure diversity within the faculty, administration, staff, and student body and to incorporate into the curriculum and extra-curricular activities educational efforts to reduce racism and other forms of discrimination); and eliminate discriminatory educational policies, practices and procedures that exist on the campuses.

Campus administrators may not, however, enact campus codes of conduct prohibiting discriminatory harassment of students, faculty, administrators and staff on the basis of speech or expression unless at a minimum all of the following conditions are met:

1. The code of conduct reaches only speech or expression that:

a) is specifically intended to and does harass an individual or specific individuals on the basis of their sex, race, color, disability, religion, sexual orientation, alienage, or national and ethnic origin; and

b) is addressed directly to the individual or individuals whom it harasses; and

c) creates a hostile and intimidating environment which the speaker reasonably knows or should know will seriously and dire

ctly impede the educational opportunities of the individual or individuals to whom it is directly addressed; and

2. The code of conduct is enforced in a manner consistent with due process protections (including the right of any individual charged with violation to notice and a hearing), contains specific illustrations of expected occurrences which

demonstrate when the policy does or does not apply, is proportionate to the gravity of the violation, and does not impose prior restraint upon expression.

March 8, 1990

## APPENDIX B

UNIVERSITY OF CALIFORNIA/OFFICE OF THE PRESIDENT  
UNIVERSITYWIDE STUDENT CONDUCT: HARASSMENT POLICY

Addition to Section 51.00, Student Conduct, *Policies Applying to Campus Activities, Organizations, and Students* (Part A)  
51.00 Student Conduct

Chancellors may impose discipline for violation of University policies or campus regulations. Such violations include the following types of misconduct:

\* \* \*

51.xx The use of "fighting words" by students to harass any person(s) on University property, on other property to which these policies apply as defined in campus implementing regulations, or in connection with official University functions or University-sponsored programs.

"Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. "fighting words" constitute "harassment" when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.

September 21, 1989

## APPENDIX C

## STANFORD UNIVERSITY

## INTERPRETATION OF FUNDAMENTAL STANDARD

Stanford University Campus Report, May 30, 1990, p. 17.

## Preamble

The Fundamental Standard requires that students act with "such respect for . . . the rights of others as is demanded of good citizens." Some incidents in recent years on campus have revealed doubt and disagreement about what this requirement means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation of the Fundamental Standard is offered by the Student Conduct Legislative Council to provide students and administrators with guidance in this area.

## Fundamental Standard Interpretation:

## Free Expression and Discriminatory Harassment

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.

2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right of equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expres-

sion ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and

b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Effective

July 11, 1990

## APPENDIX D

## THE UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT

Doe v. University of Michigan, 721 F. Supp. 852, 856-57 (E.D.Mich. 1989)

A. *The Terms of the Policy*

The Policy established a three-tiered system whereby the degree of regulation was dependent on the location of the conduct at issue. The broadest range of speech and dialogue was "tolerated" in variously described public parts of the campus. Only an act of physical violence or destruction of property was considered sanctionable in these settings. Publications sponsored by the University such as the *Michigan Daily* and the *Michigan Review* were not subject to regulation. The conduct of students living in University housing is primarily governed by the standard provisions of individual leases, however the Policy appeared to apply in this setting as well. The Policy by its terms applied specifically to "[e]ducational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers[.]" In these areas, persons were subject to discipline for:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that

- a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or

- b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

- c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual



on the basis of sex or sexual orientation where such behavior:

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extracurricular activities.

On August 22, 1989, the University publicly announced . . . that it was withdrawing section 1(c) on the grounds that "a need exists for further explanation and clarification of [that section] of the policy." No reason was given why the analogous provision in paragraph 2(c) was allowed to stand.

The Policy by its terms recognizes that certain speech which might be considered in violation may not be sanctionable, stating: "The Office of the General Counsel will rule on any claim that conduct which is the subject of a formal hearing is constitutionally protected by the first amendment."